MOTION FILED
170 SEP - 9 2010
(2)

No. 10-204

In the Supreme Court of the United States

E.S.H.,

Petitioner,

v.

K.D. AND S.L.C.,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* CENTER FOR ARIZONA POLICY, CITIZENS FOR COMMUNITY VALUES, CORNERSTONE ACTION, CORNERSTONE FAMILY COUNCIL, FAMILY ACTION OF TENNESSEE, FAMILY FOUNDATION, INDIANA FAMILY INSTITUTE, GEORGIA FAMILY COUNCIL, LOUISIANA FAMILY FORUM ACTION, MASSACHUSETTS FAMILY INSTITUTE, MINNESOTA FAMILY COUNCIL, NEW JERSEY FAMILY POLICY COUNCIL, NORTH CAROLINA FAMILY POLICY COUNCIL, OKLAHOMA FAMILY POLICY COUNCIL, PENNSYLVANIA FAMILY INSTITUTE, AND WISCONSIN FAMILY ACTION IN SUPPORT OF PETITIONER

L. THEODORE HOPPE, JR.
HOPPE & MARTIN, LLP
423 MCFARLAN ROAD
KENNETT SQUARE, PA 19348
THOPPE@HOPPEMARTIN.COM
(610) 444-2001

RANDALL L. WENGER
INDEPENDENCE LAW CENTER
23 NORTH FRONT STREET
SECOND FLOOR
HARRISBURG, PA 17101
(717) 657-4990
Attorneys for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

On August 16, 2010, *amici curiae*, Center for Arizona Policy, Citizens for Community Values, Cornerstone Action, Cornerstone Family Council, Family Action of Tennessee, Family Foundation, Indiana Family Institute, Georgia Family Council, Louisiana Family Forum Action, Massachusetts Family Institute, Minnesota Family Council, New Jersey Family Policy Council, North Carolina Family Policy Council, Oklahoma Family Policy Council, Pennsylvania Family Institute, and Wisconsin Family Action, as required by Sup. Ct. R. 37.2(a), notified both Petitioner's counsel and Respondents' counsel of its intent to file this brief *amici curiae*. Petitioner's counsel consented to this filing, but Respondents' counsel did not. Consequently, *amici* move this Court, pursuant to Sup. Ct. R. 37.2(b), for leave to file this brief of *amici curiae*.

Amici, as described below, are not-for-profit organizations that seek to benefit families and children through public policies favorable to the family. They are concerned about the effect on families of caselaw that allows the parental rights of fit, natural parents to be divested by third parties since this undermines a fundamental building block of our society. Numerous of the *amici* organizations produce reports and regularly advocate before state and local governments regarding policies affecting the family.

Amici request leave to file this brief to communicate their concern that the decision of Pennsylvania's courts has created a dangerous departure from our history of constitutionally protected parental rights. Given the work of *amici* and their perspective from particularized experience advocating for families and children, this Court should grant leave to file this brief of *amici curiae*.

Respectfully submitted,

RANDALL L. WENGER
Counsel of Record
Independence Law Center
23 North Front Street, Second Floor
Harrisburg, PA 17101
rwenger@indlawcenter.org
(717) 657-4990

L. THEODORE HOPPE, JR.
Hoppe & Martin, LLP
423 McFarlan Road
Kennett Square, PA 19348
thoppe@hoppemartin.com
(610) 444-2001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. It is a violation of a fit, natural parent's well established, constitutionally protected fundamental rights to have those rights divested in favor of a legal stranger 4

II. Giving custody to legal strangers threatens societal stability by undermining a foundational pillar of society—the parent-child relationship 15

III. Children's interests are best served when third party interference is minimized 21

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Hoff v. Berg,
595 N.W.2d 285 (N.D. 1999) 13

In re Custody of O'Rourke,
514 N.E.2d 6 (Ill. App. Ct. 1987) 20

In re J.P.,
648 P.2d 1364 (Utah 1982) 12

In re Marriage of Santa Cruz,
527 N.E.2d 131 (Ill. App. Ct. 1988) 20

J.A.L. v. E.P.H.,
682 A.2d 1314 (Pa. Super. 1996) 5

Johnson v. Hunter,
447 N.W.2d 871 (Minn. 1989) 24

K.D. v. E.S.H.,
990 A.2d 57 (Pa. Super. 2009) 5, 14

Lassiter v. Dep't of Social Services,
452 U.S. 18 (1981) 10

Meyer v. Nebraska,
262 U.S. 390 (1923) 6, 11, 13

M.L.B. v. S.L.J.,
519 U.S. 102 (1996) 8, 10

Palko v. Connecticut,
302 U.S. 319 (1937) 11

Parham v. J. R.,
442 U.S. 584 (1979) 9, 24

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 11-13

Planned Parenthood v. Casey,
505 U.S. 833 (1992) 16

Powledge v. United States,
88 F. Supp. 561 (D. Ga. 1950) 20

Prince v. Massachusetts,
321 U.S. 158 (1944) 6, 16

Quilloin v. Walcott,
434 U.S. 246 (1978) 18

Santosky v. Kramer,
455 U.S. 745 (1982) 10, 12, 15, 18

Smith v. Organization of Foster Families for Equality & Reform,
431 U.S. 816 (1977) 16, 17

Snyder v. Massachusetts,
291 U.S. 97 (1934) 11

Stanley v. Illinois,
405 U.S. 645 (1972) 8

Troxel v. Granville,
530 U.S. 57 (2000) ..... *passim*

Washington v. Glucksberg,
521 U.S. 702 (1997) 11

Wisconsin v. Yoder,
406 U.S. 205 (1972) 10, 12

Uhing v. Uhing,
488 N.W.2d 366 (Neb. 1992) 18, 24

SECONDARY SOURCES

David D. Meyer, *What Constitutional Law Can Learn from the ALI Principles of Family Dissolution*,
2001 BYU L. REV. 1075 (2001) 19

Diane L. Abraham, *California's Stepparent Visitation Statute: For the Welfare of the Child, or a Court-Opened Door to Legally Interfere with Parental Autonomy: Where are the Constitutional Safeguards?*,
7 S. CAL. REV. L. & WOMEN'S STUD. 125 .... 9, 22

Elizabeth Weiss, *Nonparent Visitation Rights v. Family Autonomy: An Abridgment of Parents' Constitutional Rights?*
10 SETON HALL CONST. L.J. 1085 (2000) .. 17-18

Eric G. Andersen, *Children, Parents, and Non-Parents: Protected Interests and Legal Standards*, 1998 BYU L. REV. 935 (1998) 17

Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Co-parenting of Her Child*, 48 ARIZ. L. REV. 97 (2006) 9-10

Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79 (1997) 19, 22

Lawrence Schlam, *Standing in Third Party Custody Disputes in Arizona: Best Interests to Parental Rights- And Shifting the Balance Back Again*, 47 ARIZ. L. REV. 719 (2005) 21

Lynn D. Wardle, *Relationships Between Family and Government*, 31 CAL. W. INT'L L.J. 1 (2000) 7

Martin Guggenheim, *What's Wrong with Children's Rights* (2005) 16, 23

Sarah H. Ramsey, *Constructing Parenthood for Stepparents: Parents by Estoppel and De Facto Parents Under the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 285 (2001) 23

William C. Duncan, *De Facto Parents*,
NAT'L REVIEW ONLINE, Aug. 31, 2009..... 24

William C. Duncan, *Waxing State, Waning Family: The Radical Agenda of the American Law Institute*,
THE FAMILY IN AMERICA, Winter 2010..... 13

INTEREST OF *AMICI*[1]

Amici are numerous tax-exempt organizations with memberships in various states that share a common concern over policies that impact the family. In particular, these organizations recognize that the bond between parent and child is essential to our society and is undermined when fit parents are divested of their parental rights. They wish to emphasize that our laws should uphold, as they have historically done, the fundamental right to parent one's children. Many of the *amici* regularly advocate in state and local government for policies that impact the family. Their collective work has included policy reports, education, testimony before governmental bodies, and litigation. *Amici* submit this brief in support of Petitioner, E.S.H.

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or part, and that no person or entity, other than one of the *amici*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of *amici's* intention to file this brief. Petitioner's counsel consented to this filing, but Respondents' counsel did not.

SUMMARY OF ARGUMENT

The U.S. Supreme Court must grant certiorari and reverse the judgment of the Pennsylvania Superior Court because that court's decision directly conflicts with precedent from this Court that recognizes the fundamental right to the care and custody of one's child. Despite this Court's precedent and the rights inherent in the U.S. Constitution, an involved and loving father lost his fundamental right to the care and custody of his child to a legal stranger. This was a direct result of Pennsylvania courts establishing a new "flexible" standard for determining *in loco parentis* status that is "dependent on the facts of the case." This "standard" is no standard at all and lacks any protection for fit, natural parents to prevent their parental rights from being divested by third parties. Under the new "standard" established by Pennsylvania courts, *in loco parentis* status can be established by *any* adult that has provided care for a child. This is a clear violation of *Troxel v. Granville*, 530 U.S. 57 (2000).

Not one natural parent is safe from potentially having their fundamental rights surrendered to a third party. Allowing fundamental rights to be violated in this way will undermine the bond between parents and their children and lead to a breakdown of family, which is an indispensable building block of society. Parental rights constitute a zero-sum game—if primary custody is given to a new party, then the existing parent's rights must necessarily be divested. This is more than an issue affecting the

rights of parents, because children's interests are best served when they are in the custody of their natural parents, when there is certainty in this arrangement, and when third party interference is minimized. For these reasons, certiorari should be granted to prevent Pennsylvania's new *in loco parentis* standard from undermining the constitutional rights of fit, natural parents.

ARGUMENT

I. It is a violation of a fit, natural parent's well established, constitutionally protected fundamental rights to have those rights divested in favor of a legal stranger.

Eric and Karen Harner divorced when their daughter, O.H., was three years old. Primary custody was awarded to the Mother although both parents remained active and involved in O.H.'s life. Mr. Harner saw O.H. on a weekly basis. The Mother began to cohabitate with Kent Deeter, and they eventually married. Shortly thereafter, the Mother passed away.

Mr. Deeter sought and was awarded *primary* custody against the wishes of Mr. Harner, the natural father. Mr. Harner has always been involved in O.H.'s life and never consented to Mr. Deeter assuming parental duties. Mr. Harner was obviously in no position to put a stop to the remarriage of O.H.'s mother or to prevent the inevitable role Mr. Deeter would play in O.H.'s life. Nevertheless, Mr. Harner's fundamental right to the care and custody of his daughter must trump the secondary interests of a legal stranger. The present, bizarre outcome, where a fit, natural parent was awarded only partial custody of his daughter while a legal stranger was awarded primary physical custody, is a result of Pennsylvania's new *in loco parentis* standard that undermines the fundamental rights of natural

parents while recognizing any and every competing interest in the child from third parties.

In its decision affirming the grant of custody to Mr. Deeter, the Pennsylvania Superior Court held that the presumption that a child's best interest is served by maintaining family autonomy "must give way where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eyes a stature like that of a parent." *K.D. v. E.S.H.*, 990 A.2d 57 (Pa. Super. 2009) (table) (text at Petitioner's Appendix, 8a) (quoting *J.A.L. v. E.P.H.*, 682 A.2d I314, 1319-1320 (Pa. Super. 1996)). The Court went on to hold that this standard is "flexible and dependent on the particular facts of the case". *Id.* at 9a. Astoundingly, there is no requirement that a parent be unfit before their rights are divested. This type of standardless divestiture of parental rights is in direct conflict with the fundamental right to the care and custody of one's child.

The alarming effect of this decision is not limited to situations where there has been a death in the family. Under Pennsylvania's caselaw, there is no limit to who may be deemed a parent and given primary custody. Mr. Deeter would have still been eligible for *in loco parentis* status if he and the Mother were merely cohabitating and never married. Moreover, if Mr. Deeter remarries, his new spouse could be eligible for parental rights under this standard. In fact, this standard would

have allowed Mr. Deeter to seek custody against the Mother.

In Pennsylvania, *not one* fit, natural parent is now immune from a potentially limitless number of claims by third parties. Any law, whether caselaw or statutory, divesting natural parents' rights must have standards so that those fundamental rights are not undermined. More importantly, any standard governing custody must start with the presumption that a fit, natural parent's right to custody will not be trumped by a third party. Any other standard serves to undermine this well-established fundamental right.

The vague standard created by the Pennsylvania courts is a violation of Mr. Harner's fundamental right to the care and custody of his child, which has been recognized by the Supreme Court time and again. Most recently in *Troxel*, this Court affirmed the constitutional right of a parent to raise their child. The Court stated:

> [I]n *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own..." We returned to the subject in *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and again confirmed that

> there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.*, at 166, 64 S.Ct. 438.

Troxel, 530 U.S. at 66.

As highlighted above, parents have the right to direct the upbringing of their children, control their education, and prepare them for life's obligations. Indeed, the home is the foundation of democracy for it is there that children begin to formulate ideas about who they are, how they relate to others, and how to solve problems. Lynn D. Wardle, *Relationships Between Family and Government*, 31 CAL. W. INT'L L.J. 1, 4 (2000) ("Truly, '[t]he family is the very seedbed of democracy. Home is the place where we get our first ideas about [ourselves], our attitudes toward other people, and our habits of approaching and solving problems.'" (alterations in original)). By allowing an individual such as Mr. Deeter to be treated as a parent and to subsequently acquire *primary* custody, Pennsylvania has divested Mr. Harner of his fundamental rights in the absence of a compelling governmental interest. Mr. Deeter is now able to make decisions concerning the child's medical care, religious upbringing, and moral teachings. If Mr. Deeter begins to cohabitate or

marries and then dies, his new wife similarly stands to make decisions regarding O.H.'s upbringing. If they later separate, then under the court's standard, the new wife would be able to seek custody of the child thereby further undermining Mr. Harner's parental rights.

The Supreme Court has recognized that the fundamental right of parents to the custody, care, and nurture of their child is a right that needs freedom from interference. As the Supreme Court noted in *M.L.B. v. S.L.J*, "few consequences of judicial action are so grave as the severance of *natural* family ties." 519 U.S. 102, 119 (1996) (internal citations omitted) (emphasis added). As observed in the long line of cases cited in *Troxel*, the fundamental right of a natural parent to parental autonomy is well-established. The Court recognized a fundamental right of a fit, natural parent "to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 72. This interest is entitled to heightened protection from interference by third parties. *Id.*

The Court stated:

> In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) ("It is plain that the interest of a parent in the companionship, care,

> custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); ...*Parham v. J. R.*, 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course")....

Troxel, 530 U.S. at 66.

An overarching theme of *Troxel* is that legal parents enjoy the right to determine who else should be allowed to interact with their child because interaction with others will influence the moral development of a child. *See* Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Co-parenting of Her Child*, 48 ARIZ. L. REV. 97, 111 (2006) (citing *Troxel*, 530 U.S. at 72 for the proposition that legal parents have the fundamental right to interact with and influence the moral development of their child); Diane L. Abraham, *California's Stepparent Visitation Statute: For the Welfare of the Child, or a Court-Opened Door to Legally Interfere with Parental Autonomy: Where are the Constitutional Safeguards?*, 7 S. CAL. REV. L. & WOMEN'S STUD. 125, 151 ("Not only is parenting a fundamental

liberty interest protected against unwarranted state intrusion (warranted by instances of abuse, neglect or other unfitness of the natural parent), but an attempt to judicially enforce visitation rights by third parties would divide and hamper proper parental authority. Visitation by a nonparent against a natural parent's objection intrudes on parental authority and impression."). This fundamental right also necessarily gives the "constitutional" or "legal" parent a right to decide whether a legal stranger can become a second parent to the child. Spitko, *supra* at 111.

The Supreme Court also noted in *Troxel* that "the parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment." *Troxel*, 530 U.S. at 74. Furthermore, in *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 27 (1981), it was stated that it is "plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" In *M.L.B. v. S.L.J.*, the Supreme Court noted that "the Court was unanimously of the view that 'the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment.'" 519 U.S. 102, 119. *See also Santosky v. Kramer*, 455 U.S. 745, 754 (1982) ("When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (the

primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (parents have a right coupled with a duty to the freedom to raise their children); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (the Due Process right of parents to "bring up" their children is fundamental).

The Supreme Court has also observed:

> The Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," *id.*, at 503 (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937).

Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

The Supreme Court has recognized substantive protections under the Fourteenth Amendment granting parental autonomy in raising children. It necessarily follows that parents must have physical custody of their children to enjoy the benefit of those rights. This Court has noted that "the child is not the mere creature of the State."

Pierce, 268 U.S. 10, 535. Parental autonomy and its importance in western society is a longstanding tradition that is deeply rooted in our society. *See In re J.P.*, 648 P.2d 1364, 1373-76 (Utah 1982) ("The integrity of the family and the parents' inherent right and authority to rear their own children have been recognized as fundamental axioms of Anglo-American culture, presupposed by all our social, political, and legal institutions.... This parental right transcends all property and economic rights. This recognition of the due process and retained rights of parents promotes values essential to the preservation of human freedom and dignity and to the perpetuation of our democratic society"). It is also noted in *Troxel* that "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." 530 U.S. at 65.

Troxel emphasizes the following caselaw regarding the importance and history of this right in western civilization:

> *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition").... *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599

> (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Glucksberg, supra*, at 720, 117 S.Ct. 2258 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t]...to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce*)).

530 U.S. at 66.

This pertinent caselaw, which was overlooked by the lower courts in the instant action, protects parental autonomy so that it can be free from excessive demands from third parties. It is a violation of the fundamental right to the care and custody of one's child to allow claims of unrelated adults for child visitation (let alone primary custody) when a natural parent is fit. Here there are not even any statutes or caselaw limiting the number of claims or situations where such claims would be appropriate. These claims will subject fit, natural parents to unjustifiable intervention. *See* William C. Duncan, *Waxing State, Waning Family: The Radical Agenda of the American Law Institute*, THE FAMILY IN AMERICA, Winter 2010 at 21 (explaining that parental wishes will become subjected to the competing claims of legal strangers with the expansion of *in loco parentis* and de facto parenting). This will greatly undermine the parental interest in both caring for

the child and in promoting the family as a societal institution.

The problems with the state court's decision granting standing to Mr. Deeter was compounded by its application of a "convincing reasons" test for granting custody. While the court noted that a biological parent has a prima facie right to custody over a third party, the Court then went on to state that this prima facie right could be overcome by a showing of "convincing reasons" to do so. *K.D.* at 10a, 23a. This test, however, falls well short of the standard that this Court has set for awarding custody to a third party over a biological parent.

The law is clear that absent a compelling governmental interest, nothing may interfere with this fundamental right. *Troxel*, 530 U.S. at 65; *See also Hoff v. Berg*, 595 N.W.2d 285, 291 (N.D. 1999) (applying strict scrutiny analysis to custody case). There is no precedent which supports a "convincing reasons" test for infringing with a fundamental, constitutional right. Even if the applicable standard were less than strict scrutiny, this Court has never employed "convincing reason" as the test. Given the well settled case law affirming parental rights as a fundamental right under the Constitution, the standard for infringement should be no less than strict scrutiny of a request to take custody of a child away from a fit biological parent. Here, the state court erred in failing to apply the appropriate standard instead using a far lower standard.

Certainly there are situations where a parent is unfit and divesting that parent's rights appropriately survives strict scrutiny. *See e.g. Santosky*, 455 U.S. at 760 (stating that "*until the State proves parental unfitness*, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship") (emphasis added). However, absent a showing of a compelling governmental interest through lack of fitness, parental autonomy must be protected to preserve the stability of society and promote the ability of the parent to raise and socialize their child without interference. In the instant case, Mr. Deeter's desire for connection with O.H. does not rise to a compelling state interest. Certainly Mr. Harner's fundamental right to the care and custody of his natural child, whose life he has *always* been involved in, should have greater weight than the claim of a legal stranger. The illogical balancing act that puts the rights of a legal stranger ahead of a natural parent cannot be reconciled with Mr. Harner's fundamental rights, and certiorari must be granted.

II. Giving custody to legal strangers threatens societal stability by undermining a foundational pillar of society–the parent-child relationship.

Granting custody to a third party necessarily requires divesting a natural parent of some level of custody. Many parents will not be able to effectively prevent third parties from assuming a parenting role in the child's life—such as here after a divorce occurred. This will lead to the

deterioration of family bonds and will blunt the ability of any single parental figure to model and inculcate those cultural values necessary to be transmitted to the next generation. Exposure to more voices makes any given voice less strong. Our society depends upon parents inculcating values on their children. This aspect of our established social order is undermined when there are a multitude of voices rather than a unified parental voice influencing the child. "Precisely because childrearing means forming the values, interests, ideas, and religious beliefs of the next generation, we should expect American law to insist, as the Supreme Court has, that the state cannot enter the domain of family life." Martin Guggenheim, *What's Wrong with Children's Rights* 25 n.91 (2005). *See also Planned Parenthood v. Casey*, 505 U.S. 833, 926–27 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (observing that the Supreme Court has held that "the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as . . . childrearing"). Parental decisions to instill values in children and to expose them to religious training are judgments that "the state can neither supply nor hinder." Guggenheim, 25 n.91 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

Under Pennsylvania law, since *in loco parentis* status is not based on unfitness or even consent, there is an open door for unjustified interference into various parent-child relationships in the state. In *Smith v. Organization of Foster*

Families for Equality & Reform, 431 U.S. 816, 863 (1977) (Stewart, J., concurring), Justice Stewart stated that if "a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'"

Our culture is defined by the principle that parents take responsibility for their children and that they will act in the best interests of their children. *See Troxel*, 530 U.S. at 68 (explaining there is a presumption that fit parents act in the best interests of their children). Parenting is society's primary means of socializing children, and without parental security from outside demands, the values taught through the parent-child relationship will weaken. *See* Eric G. Andersen, *Children, Parents, and Non-Parents: Protected Interests and Legal Standards*, 1998 BYU L. REV. 935, 946 (1998) (explaining that the moral and cultural values taught through family will deteriorate if the family is subject to numerous outside demands).

Furthermore, we should respect the fundamental right to the care and custody of one's child by requiring a showing of harm before embarking on the vague "best interests" analysis. *See* Elizabeth Weiss, *Nonparent Visitation Rights v. Family Autonomy: An Abridgment of Parents'*

Constitutional Rights? 10 SETON HALL CONST. L.J. 1085, 1131 (2000) (noting that "by requiring an initial showing of harm or parental unfitness before the best interests standard is evoked, parents' childrearing decisions will be subject to minimal judicial second-guessing and the family autonomy protected by the Constitution will retain its intended integrity"). The ability for the natural parent and child to bond is contingent upon upholding the parents' fundamental right to the care and custody over their child.

Not only does the fit, natural parent have a fundamental right to the care and custody of their child, but it has also been recognized that children have a reciprocal constitutionally protected right in the establishment and continuation of the relationship with their natural parents, *without interference.* A child is entitled to constitutional protection from intrusion into the child-parent relationship. *See Troxel*, 530 U.S. at 66 ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected") (citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)); *Santosky*, 455 U.S. at 760 ("until the State proves parental unfitness, *the child and his parents* share a vital interest in preventing erroneous termination of their natural relationship") (emphasis added); *Uhing v. Uhing*, 488 N.W.2d 366, 374-75 (Neb. 1992) (The Constitution "protects not only the parent's right to the companionship, care, custody, and management of his or her child, but also protects the child's reciprocal right to be raised and nurtured by a biological or adoptive parent").

If the parent-child relationship is interfered with, this can only be constitutionally justified with a showing of a compelling state interest, such as likelihood of harm to the child through parental unfitness. *See* David D. Meyer, *What Constitutional Law Can Learn from the ALI Principles of Family Dissolution*, 2001 BYU L. REV. 1075 (2001) (supporting the proposition that a compelling interest often equals a showing that substantial harm has or will occur).

The Pennsylvania standard undermines a stable relationship for both the parent and the child. It is beyond comprehension that in this case that the fit, natural parent was only awarded time with his daughter every other weekend and holidays while a third party, Mr. Deeter, was awarded primary physical custody and gets to raise Mr. Harner's child. Although Mr. Deeter, who was married to the child's mother for 14 months, has played some role in the child's life, it would be an act of social reengineering to suggest that he played a more important role than her *natural* father, who has always been involved in O.H.'s life. To a significant extent, custody rights are a zero-sum game—if primary rights are given to one party, then the other party's rights are divested. *See* Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 87 (1997) (explaining that a legal dispute over a child is a "zero-sum game" and the parent who wins considers himself a "victor in war" while the child may be the loser). Due to the fact that the relationship between natural parent and child

forms the foundation of our society, the *primary* custody rights of a fit, natural parent should not be undermined at the expense of a legal stranger's secondary interest. We must preserve the liberty of our citizens to have a child and know that as long as they remain involved, they will always have a right to parent that child that cannot be limited except by the other natural or adoptive parent.

While *in loco parentis* status can be useful and important in certain circumstances, any statute or common law doctrine must be secondary to the fundamental, constitutionally protected right to parent and that such a status should not be conferred over the objection of a fit, natural parent. Other courts have viewed *in loco parentis* narrowly because they recognize that the fundamental rights of parental autonomy are worth preserving. *See e.g., Powledge v. United States*, 88 F. Supp. 561, 563 (D. Ga. 1950) (explaining that for a statute defining *in loco parentis*, it is likely that by not opening it up to all categories of caretakers "Congress expressed its intention to keep th[e] class of beneficiaries in well defined limits."); *In re Marriage of Santa Cruz*, 527 N.E.2d 131, 139 (Ill. App. Ct. 1988) (the court refused to grant a maternal grandmother standing to request custody where there was insufficient evidence that child's mother had voluntarily relinquished physical custody even though the mother had packed her things and left the child with the grandparent); *In re Custody of O'Rourke*, 514 N.E.2d 6 (Ill. App. Ct. 1987) (a maternal aunt and uncle who would sometimes care for the children did not have standing because the court ruled that when the

mother died, physical custody of the children transferred to their father); Lawrence Schlam, *Standing in Third Party Custody Disputes in Arizona: Best Interests to Parental Rights- And Shifting the Balance Back Again*, 47 ARIZ. L. REV. 719, 745 (2005).

In this case, the Pennsylvania Courts declined to utilize necessary standards but rather allowed Mr. Deeter to assume *in loco parentis* status over the objections of a fit, natural parent—simply because of his relationship with the mother. This is outside of the "well defined limits" intended by other courts and required by constitutional considerations. Our understanding of parental rights is rooted in our nation's history and necessary to our understanding of ordered liberty, and this decision is adverse to those well-established values in western civilization. A similar situation that happened to Mr. Harner could happen to *anyone* unless Pennsylvania is required to adhere to appropriate standards when divesting custody. Because of the lack of necessary standards, fundamental rights and parent-child bonding are in jeopardy, risking further damage to societal stability.

III. Children's interests are best served when third party interference is minimized.

In custody and visitation disputes, children are often collateral damage. It is important that the Courts do not increase the occurrence of this unfortunate reality by expanding the universe of

those who can demand custody. An increase in custody disputes will increase the burden on children who not only must be shuttled around and endure uncertainty in their lives but must witness the animosity between important figures in their lives. For the child's welfare, these instances should be minimized. The fewer people that have standing to challenge custody and visitation, the better off the child will be. *See* Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 86-87 (1997) (noting that the conflicts over the best interest of the child continue to take place in a win or lose framework).

Our society implicitly recognizes the notion that a child belongs to his or her natural parents and that the natural parents have a fundamental right to the custody of their child to prevent children from being "tossed around." *See* Abraham, *supra* at 125, 150 ("If stepparent visitation is ordered over a natural parent's objections, the child is at risk for being placed in the middle of a litigation tug-of-war").

If this decision is allowed to stand, whoever is deemed to be *in loco parentis* and can afford to litigate over parental rights can "buy time" with the child. Furthermore, because of the nature of the adversarial system, the prize fighting attitude in such disputes can sometimes involve extreme accusations and even child coercion. Weinstein, *supra* at 86-87. This environment highlights third parties' self-interest while blatantly disregarding children's vital relationship with their natural

parents. An invasion of this relationship comes at a cost. *See Troxel*, 530 U.S. at 64 (observing that "the State's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship").

As noted in *Troxel*, the "demographic changes of the past century make it difficult to speak of an average American family." 530 U.S. at 63. The unfortunate reality in a country with high divorce rates and single parent families is that children relocate often. It is in a child's best interest to live with her fit, natural parent and be free from interference. This has been consistently recognized in the law. Indeed, "American society has always given great weight to the parent-child relationship, and, in general, our culture has accepted the principle that important decisions about the custody and control of children should be left in the hands of natural parents." Guggenheim, *supra* at 18.

Children, whose interests are vitally important, have no standing to bring an action and have only a muted voice in proceedings dealing with their family relationships. *See* Sarah H. Ramsey, *Constructing Parenthood for Stepparents: Parents by Estoppel and De Facto Parents Under the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 285, 286 (2001). Since children are not truly in a position to advocate their own interests, our laws must recognize that it is best that third party interference be minimized. Third party interference subjects the child to multiple

competing claims, lack of bonding with their natural parents, disputes between the adults in their lives, and being shuffled around. In these complex situations, protecting the fundamental right of the fit and involved natural parent also serves the child.

The Supreme Court stated in *Parham v. J.R.*, 442 U.S. 584, 602 (1979), and reaffirmed in *Troxel*, 530 U.S. at 68, that "historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." Furthermore, the child has a reciprocal right in the continuance of the relationship with their natural parent absent the rebuttal of the fitness presumption. *See Uhing*, 488 N.W.2d at 374-75 (noting that the "establishment and continuance of the parent-child relationship 'is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic constitutional rights'" (citing *Johnson v. Hunter*, 447 N.W.2d 871, 876 (Minn. 1989))). It is a violation of the parent's rights *and* the child's rights to award primary custody to a third party without a showing of unfitness.

In the instant case we have an involved, natural father who objects to surrendering his parental rights. In *Troxel*, the Supreme Court noted the presumption "that natural bonds of affection lead parents to act in the best interests of their children." 530 U.S. at 68 (quoting Parham, 442 U.S. at 602). *See also* William C. Duncan, *De Facto Parents*, NAT'L REVIEW ONLINE, Aug. 31,

2009[2] (explaining that biological ties "increase[] the likelihood that the parents would identify with the child and be willing to sacrifice for that child, and it would reduce the likelihood that either parent would abuse the child"). The ability of a natural parent to bond with their child is essential in a relationship that has been recognized as fundamental in our society. It is important for the welfare of children, that their bonding with their natural parents not be disturbed. Every other weekend and holidays, which is all that was awarded to Mr. Harner, is simply not enough time to foster the vital biological parent-child relationship.

---

[2] Available at http://article.nationalreview.com/404642/de-facto-parents/william-c-duncan.

CONCLUSION

This Court has repeatedly affirmed the fundamental rights of parents to raise their children without interference. The cases on this point are legion. Nevertheless, Pennsylvania courts, as evidenced by the decision in this case, have held this fundamental right to be subservient to a nebulous "flexible" *in loco parentis* doctrine, which the state court held would be defined based on the facts of each specific case. This holding is directly contrary to this Court's well-established precedent and is a blatant infringement on an important right, one that is critical to the stability and health of the family and our society, and cannot be allowed to stand. Parental rights constitute a zero-sum game---if primary custody is given to a new party, then the existing parent's rights must necessarily be divested. Moreover, this is more than an issue affecting the rights of parents, because children's interests are best served when they are in the custody of their natural parents and third party interference is minimized. It is imperative, therefore, that this Court grant certiorari and reverse the judgment of the Pennsylvania Superior Court establishing clearly that the rights of a fit, natural parent may not be infringed upon.

Respectfully submitted,

RANDALL L. WENGER
Counsel of Record
Independence Law Center
23 North Front Street, Second Floor
Harrisburg, PA 17101
rwenger@indlawcenter.org
(717) 657-4990

L. THEODORE HOPPE, JR.
Hoppe & Martin, LLP
423 McFarlan Road
Kennett Square, PA 19348
thoppe@hoppemartin.com
(610) 444-2001

Attorneys for *amici curiae*:

Center for Arizona Policy, Citizens for Community Values, Cornerstone Action, Cornerstone Family Council, Family Action of Tennessee, Family Foundation, Indiana Family Institute, Georgia Family Council, Louisiana Family Forum Action, Massachusetts Family Institute, Minnesota Family Council, New Jersey Family Policy Council, North Carolina Family Policy Council, Oklahoma Family Policy Council, Pennsylvania Family Institute, and Wisconsin Family Action

Dated: September 9, 2010